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No. 82-526

In the Supreme Court of the United States

OCTOBER TERM, 1982

SECURITIES AND EXCHANGE COMMISSION, PETITIONER

v.

BOARD OF TRADE OF THE CITY OF CHICAGO AND CHICAGO BOARD OPTIONS EXCHANGE, INC.

SECURITIES AND EXCHANGE COMMISSION, PETITIONER

v.

BOARD OF TRADE OF THE CITY OF CHICAGO, CHICAGO BOARD OPTIONS EXCHANGE, INC., AND THE OPTIONS CLEARING CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE SECURITIES AND EXCHANGE COMMISSION SUGGESTING MOOTNESS

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1. On February 26, 1981, the Securities and Exchange Commission approved a proposal submitted by the Chicago Board Options Exchange ("CBOE") to establish a market for trading in options on Government National Mortgage Association pass-through securities ("GNMA options") (Pet. App. C-1 to C-15).[1] On August 6, 1981, the

[1] "Pet. App." refers to the appendix to the petition for a writ of certiorari in *Chicago Board Options Exchange, Inc. and The Options Clearing Corporation* v. *Board of Trade of the City of Chicago*, No. 82-327, which also seeks review of the judgments in these cases.

SEC approved a proposal submitted by the Options Clearing Corporation ("OCC") to issue GNMA options contracts and to clear and settle GNMA options transactions (Pet. App. D-1 to D-12). The Board of Trade of the City of Chicago ("CBOT") sought review of the SEC orders in the United States Court of Appeals for the Seventh Circuit. See 15 U.S.C. 78y. A divided panel of the court of appeals set aside both orders on identical grounds. Pet. App. A-1 to A-99; Pet. App. at B-1 to B-5.

The majority held that an option on a security is not a "security" within the meaning of Section 3(a)(10) of the Securities Exchange Act of 1934, 15 U.S.C. 78c(a)(10) (Pet. App. A-37 to A-46). Thus, the court concluded that the SEC has authority to regulate trading in put and call options only under Section 9(b) of the Securities Exchange Act, 15 U.S.C. 78i(b). Since GNMA securities are "exempted securities," however, Section 9(b) is inapplicable to trading in GNMA options (Pet. App. A-46 & n.46). Accordingly, the court held that the SEC has no jurisdiction to approve the CBOE and OCC proposals to establish trading in GNMA options. Alternatively, the court of appeals held (Pet. App. A-17 to A-36) that trading in options on GNMA securities is within the exclusive jurisdiction of the Commodity Futures Trading Commission and, consequently, unlawful under Section 4c(c) of the Commodity Exchange Act, 7 U.S.C. (Supp. V) 6c(c), which bans trading in options on commodities.

2. While these cases were pending in the court of appeals, the SEC and CFTC submitted proposed amendments to both the securities and commodities laws that, among other things, would give the SEC sole regulatory authority over options on securities. On October 13, 1982, President Reagan signed a bill that amends the Securities Exchange Act of 1934 (Pub. L. No. 97-303, 96 Stat. 1409 *et seq.*). Section 2 of Pub. L. No. 97-303 amends the definition of the term

"security" in the Act (15 U.S.C. 78c(a)(10)) to include explicitly "any put, call, straddle, option or privilege on any security * * *." App., *infra*, 1a. Section 9 of the Securities Exchange Act, 15 U.S.C. 78i, is amended to provide that the Commission's plenary authority to prescribe rules and regulations governing the trading of put and call options on national securities exchanges under Section 9(b) of the Act extends to options on all securities, including exempted securities. Finally, Section 3 of Pub. L. No. 97-303 adds a new Section 9(g) to the Securities Exchange Act of 1934, which provides (App., *infra*, 2a):

> Notwithstanding any other provision of law, the [Securities and Exchange] Commission shall have the authority to regulate the trading of any put, call, straddle, option or privilege on any security * * *.

The proposed amendments to the commodities laws, however, have not been enacted.[2]

3. These cases are now moot for two reasons. First, Pub. L. No. 97-303 effectively overrules the decision of the Seventh Circuit. Under the new legislation, GNMA options are "securities" as defined in Section 3(a)(10) of the Securities Exchange Act of 1934. In addition, the new Section 9(g) of

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[2]The House of Representatives and the Senate have passed legislation amending Section 2 of the Commodity Exchange Act (7 U.S.C. (Supp. V) 2) to provide that:

> This Act shall not apply to and the [CFTC] shall have no jurisdiction to designate a board of trade as a contract market for any transaction whereby any party to such transaction acquires any put, call, or other option on one or more securities (as defined in * * * section 3(a)(10) of the Securities Exchange Act of 1934 * * *).

H.R. [illegible], 97th Cong., 2d Sess. § 101 (1982); S. 2109, 97th Cong., 2d Sess. § 3 (1982). The bills containing the amendment to this provision differ as to matters not at issue in this case. Enactment of the legislation has been delayed pending reconciliation of the bills.

the Act vests the SEC with "the authority" to regulate trading in options on securities "[n]otwithstanding any other provision of law," and therefore the exclusive jurisdiction provision of the Commodity Exchange Act (7 U.S.C. (Supp. V) 2) does not apply to options on securities. Absent exclusive CFTC jurisdiction, the commodity option ban does not apply (Pet. App. A-17). Second, in light of Pub. L. No. 97-303, CBOE and OCC resubmitted their respective proposals to establish trading in GNMA options. On October 14, 1982, the SEC issued new orders approving the proposals. Security Exchange Act Release Nos. 19125 and 19126. In these circumstances, whether the SEC's initial orders were valid under the law as it existed in 1981 is academic.[3]

Since the issues decided by the court of appeals and presented in the petition cannot affect the rights of the litigants, these cases are moot. See *DeFunis* v. *Odegaard*, 416 U.S. 312, 316 (1974); *United States* v. *Alaska Steamship Co.*, 253 U.S. 113, 116 (1920). It is therefore respectfully submitted that the petition for a writ of certiorari should be granted, the judgments of the court of appeals vacated, and the cases remanded with directions to dismiss the petitions for review as moot. See, *e.g.*, *Great Western Sugar Co.* v. *Nelson*, 442 U.S. 92 (1979); *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 39-40 (1950).

REX E. LEE
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[3] Any person aggrieved by the SEC's new orders, of course, can seek judicial review. See 15 U.S.C. 78y.

APPENDIX

H.R.6156

[Pub. L. No. 97-303, 96 Stat. 1409 *et seq.*]

Ninety-seventh Congress of the United States of America

AT THE SECOND SESSION

Begun and held at the City of Washington on Monday, the twenty-fifth day of January, one thousand nine hundred and eighty-two

An Act

To clarify the jurisdiction of the Securities and Exchange Commission and the definition of security, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. Section 2(1) of the Securities Act of 1933 (15 U.S.C. 77b(1)) is amended by inserting after "mineral rights," the following: "any put, call, straddle, option, or privilege on any security, certificate of deposit, or group or index of securities (including any interest therein or based on the value thereof), or any put, call, straddle, option, or privilege entered into on a national securities exchange relating to foreign currency,".

SEC. 2. Section 3(a)(10) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(10)) is amended by inserting after "for a security," the following: "any put, call, straddle, option, or privilege on any security, certificate of deposit, or group or index of securities (including any interest therein or based on the value thereof), or any put, call, straddle, option, or privilege entered into on a national securities exchange relating to foreign currency,".

SEC. 3. Section 9 of the Securities Exchange Act of 1934 (15 U.S.C. 78i) is amended—

(1) by striking out "this section" in subsection (f) and inserting in lieu thereof "subsection (a)"; and

(2) by inserting after subsection (f) the following new subsection:

"(g) Notwithstanding any other provision of law, the Commission shall have the authority to regulate the trading of any put, call, straddle, option, or privilege on any security, certificate of deposit, or group or index of securities (including any interest therein or based on the value thereof), or any put, call, straddle, option, or privilege entered into on a national securities exchange relating to foreign currency (but not, with respect to any of the foregoing, an option on a contract for future delivery).".

SEC. 4. Section 28(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78bb(a)) is amended by adding at the end thereof the following new sentence: "No State law which prohibits or regulates the making or promoting of wagering or gaming contracts, or the operation of 'bucket shops' or other similar or related activities shall invalidate any put, call, straddle, option, privilege, or other security, or apply to any activity which is incidental or related to the offer, purchase, sale, exercise, settlement, or closeout of any such instrument, if such instrument is traded pursuant to rules and regulations of a self-regulatory organization that are filed with the Commission pursuant to section 19(b) of this Act".

SEC. 5. Section 2(a)(36) of the Investment Company Act of 1940 (15 U.S.C. 80a-2(a)(36)) is amended by inserting after "mineral rights," the following: "any put, call, straddle, option, or privilege on any security (including a certificate of deposit) or on any group or index of securities

(including any interest therein or based on the value thereof), or any put, call, straddle, option, or privilege entered into on a national securities exchange relating to foreign currency,".

SEC. 6. Section 202(a)(18) of the Investment Advisers Act of 1940 (15 U.S.C. 80b-2(a)(18)) is amended by inserting after "mineral rights," the following: "any put, call, straddle, option, or privilege on any security (including a certificate of deposit) or on any group or index of securities (including any interest therein or based on the value thereof), or any put, call, straddle, option, or privilege entered into on a national securities exchange relating to foreign currency,".

SEC. 7. Section 16(14) of the Securities Investor Protection Act (15 U.S.C. 78111(14)) is amended—

(1) by inserting after "Securities Act of 1933)," the following: "any put, call, straddle, option, or privilege on any security, or group or index of securities (including any interest therein or based on the value thereof), or any put, call, straddle, option, or privilege entered into on a national securities exchange relating to foreign currency,"; and

(2) by strking out "The" in the last sentence and inserting in lieu thereof "Except as specifically provided above, the".

Speaker of the House of Representatives.

Vice President of the United States and
President of the State